

**Representative Karen Kwan** proposes the following substitute bill:

**INTIMATE IMAGE DISTRIBUTION PROHIBITION**

2021 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Karen Kwan**

Senate Sponsor: Todd D. Weiler

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**LONG TITLE**

**General Description:**

This bill creates the offense of the unlawful distribution of a counterfeit intimate image.

**Highlighted Provisions:**

This bill:

- defines terms;
- creates the offense of unlawful distribution of a counterfeit intimate image;
- creates the offense of aggravated unlawful distribution of a counterfeit intimate image; and
- imposes penalties.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

**AMENDS:**

**77-36-1**, as last amended by Laws of Utah 2020, Chapter 142

**ENACTS:**

**76-5b-205**, Utah Code Annotated 1953



*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **76-5b-205** is enacted to read:

**76-5b-205. Unlawful distribution of a counterfeit intimate image -- Penalty.**

(1) As used in this section:

(a) "Child" means an individual under the age of 18.

(b) "Counterfeit intimate image" means any visual depiction, photograph, film, video, recording, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, that has been edited, manipulated, or altered to depict the likeness of an identifiable individual and purports to, or is made to appear to, depict that individual's:

(i) exposed human male or female genitals or pubic area, with less than an opaque covering;

(ii) a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or

(iii) the individual engaged in any sexually explicit conduct or simulated sexually explicit conduct.

(c) "Distribute" means the same as that term is defined in Section [76-5b-203](#).

(d) "Sexually explicit conduct" means the same as that term is defined in Section [76-5b-203](#).

(e) "Simulated sexually explicit conduct" means the same as that term is defined in Section [76-5b-203](#).

(2) An actor commits the offense of unlawful distribution of a counterfeit intimate image if the actor knowingly or intentionally distributes a counterfeit intimate image that the actor knows or should reasonably know would cause a reasonable person to suffer emotional or physical distress or harm, if:

(a) the actor has not received consent from the depicted individual to distribute the counterfeit intimate image; and

(b) the counterfeit intimate image was created or provided by the actor without the knowledge and consent of the depicted individual.

(3) An individual commits aggravated unlawful distribution of a counterfeit intimate

57 image if, in committing the offense described in Subsection (2), the individual depicted in the  
58 counterfeit intimate image is a child.

59 (4) This section does not apply to:

60 (a) (i) lawful practices of law enforcement agencies;

61 (ii) prosecutorial agency functions;

62 (iii) the reporting of a criminal offense;

63 (iv) court proceedings or any other judicial proceeding; or

64 (v) lawful and generally accepted medical practices and procedures;

65 (b) a counterfeit intimate image if the individual portrayed in the image voluntarily  
66 allows public exposure of the image;

67 (c) a counterfeit intimate image that is portrayed in a lawful commercial setting; or

68 (d) a counterfeit intimate image that is related to a matter of public concern or interest  
69 or protected by the First Amendment to the United States Constitution or Article I, Sections 1  
70 and 15 of the Utah Constitution.

71 (5) (a) This section does not apply to an Internet service provider or interactive  
72 computer service, as defined in 47 U.S.C. Sec. 230(f)(2), a provider of an electronic  
73 communications service as defined in 18 U.S.C. Sec. 2510, a telecommunications service,  
74 information service, or mobile service as defined in 47 U.S.C. Sec. 153, including a  
75 commercial mobile service as defined in 47 U.S.C. Sec. 332(d), or a cable operator as defined  
76 in 47 U.S.C. Sec. 522, if:

77 (i) the distribution of a counterfeit intimate image by the Internet service provider  
78 occurs only incidentally through the provider's function of:

79 (A) transmitting or routing data from one person to another person; or

80 (B) providing a connection between one person and another person;

81 (ii) the provider does not intentionally aid or abet in the distribution of the counterfeit  
82 intimate image; and

83 (iii) the provider does not knowingly receive from or through a person who distributes  
84 the counterfeit intimate image a fee greater than the fee generally charged by the provider, as a  
85 specific condition for permitting the person to distribute the counterfeit intimate image.

86 (b) This section does not apply to a hosting company, as defined in Section  
87 76-10-1230, if:

(i) the distribution of a counterfeit intimate image by the hosting company occurs only incidentally through the hosting company's function of providing data storage space or data caching to a person;

(ii) the hosting company does not intentionally engage, aid, or abet in the distribution of the counterfeit intimate image;

(iii) the hosting company does not knowingly receive from or through a person who distributes the counterfeit intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute, store, or cache the counterfeit intimate image; and

(iv) the hosting company immediately removes the counterfeit intimate image upon notice from a law enforcement agency, prosecutorial agency, or the individual purportedly depicted in the counterfeit intimate image.

(c) A service provider, as defined in Section [76-10-1230](#), is not negligent under this section if it complies with Section [76-10-1231](#).

(6) This section does not apply to an actor who engages in conduct that constitutes a violation of this section to the extent that the actor is chargeable, for the same conduct, under Section [76-5b-201](#), sexual exploitation of a minor.

(7) (a) Except as provided in Subsection (7)(b), knowing or intentional unlawful distribution of a counterfeit intimate image is a class A misdemeanor.

(b) Knowing or intentional unlawful distribution of a counterfeit intimate image is a third degree felony on a second or subsequent conviction for an offense under this section that arises from a separate criminal episode as defined in Section [76-1-401](#).

(c) Except as provided in Subsection (7)(d), knowing or intentional aggravated unlawful distribution of a counterfeit intimate image is a third degree felony.

(d) Knowing or intentional aggravated unlawful distribution of a counterfeit intimate image is a second degree felony on a second or subsequent conviction for an offense under this section that arises from a separate criminal episode as defined in Section [76-1-401](#).

Section 2. Section **77-36-1** is amended to read:

**77-36-1. Definitions.**

As used in this chapter:

(1) "Cohabitant" means the same as that term is defined in Section [78B-7-102](#).

(2) "Department" means the Department of Public Safety.

(3) "Divorced" means an individual who has obtained a divorce under Title 30, Chapter 3, Divorce.

(4) "Domestic violence" or "domestic violence offense" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. "Domestic violence" or "domestic violence offense" includes commission or attempt to commit, any of the following offenses by one cohabitant against another:

(a) aggravated assault, as described in Section 76-5-103;

(b) aggravated cruelty to an animal, as described in Subsection 76-9-301(4), with the intent to harass or threaten the other cohabitant;

(c) assault, as described in Section 76-5-102;

(d) criminal homicide, as described in Section 76-5-201;

(e) harassment, as described in Section 76-5-106;

(f) electronic communication harassment, as described in Section 76-9-201;

(g) kidnapping, child kidnapping, or aggravated kidnapping, as described in Sections 76-5-301, 76-5-301.1, and 76-5-302;

(h) mayhem, as described in Section 76-5-105;

(i) sexual offenses, as described in Title 76, Chapter 5, Part 4, Sexual Offenses, and Section 76-5b-201, Sexual exploitation of a minor -- Offenses;

(j) stalking, as described in Section 76-5-106.5;

(k) unlawful detention or unlawful detention of a minor, as described in Section 76-5-304;

(l) violation of a protective order or ex parte protective order, as described in Section 76-5-108;

(m) any offense against property described in Title 76, Chapter 6, Part 1, Property Destruction, Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass, or Title 76, Chapter 6, Part 3, Robbery;

(n) possession of a deadly weapon with criminal intent, as described in Section 76-10-507;

(o) discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76-10-508;

(p) disorderly conduct, as defined in Section 76-9-102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with a domestic violence offense otherwise described in this Subsection (4), except that a conviction of disorderly conduct as a domestic violence offense, in the manner described in this Subsection (4)(p), does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. Sec. 921, and is exempt from the federal Firearms Act, 18 U.S.C. Sec. 921 et seq.;

(q) child abuse, as described in Section 76-5-109.1;

(r) threatening use of a dangerous weapon, as described in Section 76-10-506;

(s) threatening violence, as described in Section 76-5-107;

(t) tampering with a witness, as described in Section 76-8-508;

(u) retaliation against a witness or victim, as described in Section 76-8-508.3;

(v) unlawful distribution of an intimate image, as described in Section 76-5b-203, or unlawful distribution of a counterfeit intimate image, as described in Section 76-5b-205;

(w) sexual battery, as described in Section 76-9-702.1;

(x) voyeurism, as described in Section 76-9-702.7;

(y) damage to or interruption of a communication device, as described in Section 76-6-108; or

(z) an offense described in Subsection 78B-7-806(1).

(5) "Jail release agreement" means the same as that term is defined in Section 78B-7-801.

(6) "Jail release court order" means the same as that term is defined in Section 78B-7-801.

(7) "Marital status" means married and living together, divorced, separated, or not married.

(8) "Married and living together" means a couple whose marriage was solemnized under Section 30-1-4 or 30-1-6 and who are living in the same residence.

(9) "Not married" means any living arrangement other than married and living together, divorced, or separated.

(10) "Protective order" includes an order issued under Subsection 78B-7-804(3).

- 181 (11) "Pretrial protective order" means a written order:  
182 (a) specifying and limiting the contact a person who has been charged with a domestic  
183 violence offense may have with an alleged victim or other specified individuals; and  
184 (b) specifying other conditions of release under Sections 78B-7-802 or 78B-7-803,  
185 pending trial in the criminal case.
- 186 (12) "Sentencing protective order" means a written order of the court as part of  
187 sentencing in a domestic violence case that limits the contact a person who has been convicted  
188 of a domestic violence offense may have with a victim or other specified individuals under  
189 Section 78B-7-804.
- 190 (13) "Separated" means a couple who have had their marriage solemnized under  
191 Section 30-1-4 or 30-1-6 and who are not living in the same residence.
- 192 (14) "Victim" means a cohabitant who has been subjected to domestic violence.